

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

74-2159

-----X  
COMPAGNIE GENERALE TRANSATLANTIQUE,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,

Defendant and Third-Party  
Plaintiff-Appellant,

-against-

RED STAR TOWING & TRANSPORTATION CO., INC.  
and TRACY TOWING LINE, INC. and BRONX  
TOWING LINE INC., in personam,

and

Tugs KATHLEEN TRACY and BRONX 4, THEIR  
ENGINES, TACKLE, ETC., in rem,

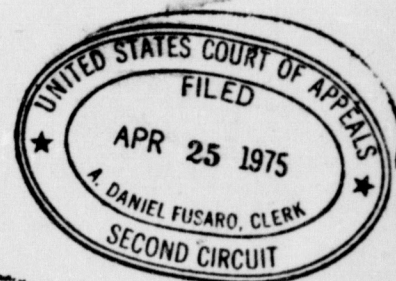
Third-Party Defendants-  
Appellees.

B  
DOCKET NO.

74-2159

-----X  
ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT-SOUTHERN DISTRICT  
OF NEW YORK

BRIEF FOR THIRD-PARTY DEFENDANT-  
APPELLEE, BRONX TOWING LINE, INC.



KRISEL, BECK & HALBERG, ESQS.

and

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Plaintiff-Appellant,	:	
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UNITED STATES OF AMERICA,	:	
Defendant and Third-	:	DOCKET NO.
Party Plaintiff-	:	
Appellant,	:	74-2159
-against-	:	
RED STAR TOWING & TRANSPORTATION CO.,	:	
INC. and TRACY TOWING LINE, INC. and	:	
BRONX TOWING LINE CO., in personam,	:	
and	:	
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ENGINES, TACKLE, ETC., IN REM,	:	
Third-Party Defendants-	:	
Appellees.	:	
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BRIEF FOR THIRD-PARTY DEFENDANT-  
APPELLEE, BRONX TOWING LINE, INC.

The only issue that concerns Bronx Towing Line, Inc., as owner of the tug BRONX 4 (hereinafter called Bronx and Bronx 4) is whether the District Court was clearly erroneous in finding as a fact not only that the BRONX 4 was not negligent but also that the Pilot of the RALEIGH gave command that were "erratic and seemingly thoughtless".

THE FACTS

As the testimony of the fact witnesses were all by Deposition, the references are to the name of the witness deposed

and the page number.

On August 18th, 1966, the U. S. S. RALEIGH, was to be shifted from the north side of Pier 90 to the south side of Pier 90. See Coast and Geodetic Chart No. 745 (Steen Ex.1). The RALEIGH was 560 feet long, 82 foot beam (Wilder P. 5). The ship was under the command of Captain Wilder, U. S. N. The Pilot, Fitzgerald (deceased) was a Civil Service Pilot employed by the Navy (Wilder P. 8). The RALEIGH had arrived in New York Harbor the day before the subject collision and had been berthed at Pier 90 with the assistance of three tugs (Wilder, P. 8). Prior to the shifting operation, the Navy ordered three tugs to assist, through Red Star, who was under contract to furnish assisting tugs to Naval vessels. Bronx Towing Line, Inc. was engaged by Red Star to furnish a tug, as was Tracy Towing Line, Inc., to furnish a tug. The third tug was a Navy tug (Wilder P. 10). The three tugs were in the vicinity of Pier 90 before the shifting operation began (Wilder P. 9).

The agreed upon plan between Wilder and Fitzgerald, the ship's Pilot, was to have one tug on the bow while getting underway, one tug on the starboard bow to assist in docking on the south side of Pier 90, the first tug was to be "standing by aft, in case he was needed" while the third tug moved the camels from one side of the Pier to the other (Wilder P. 27).

The tug KATHLEEN TRACY was ordered by the RALEIGH to make fast to the starboard bow of the ship (O'Leary, Tracy Captain, P. 8). O'Leary maneuvered to the bow, looked the situation over and reported to the Pilot that he could not work the bow because of the RALEIGH'S overhang or flare (O'Leary P. 10). The RALEIGH



was still at the Pier (P. 10). The Pilot agreed and told the TRACY to move the floats-camels. The Navy tug was at the inner bulkhead at Pier 90. The BRONX 4, originally ordered to move camels, was out in the river. Later the TRACY told the BRONX 4 to make fast to the RALEIGH'S starboard bow. That order from the Pilot was relayed to the BRONX 4 by the TRACY, because radio contact from the ship was not maintained after the initial radio contact (McGuirk P. 5 and 6).

The RALEIGH cast off her six mooring lines and, under own power, without any tugs made fast, proceeded into the stream (Wilder, P. 76). Captain Wilder described the operation as in three phases: Phase 1, was the maneuver from the Pier to the stream; Phase 2, was the maneuver to turn the ship, counter clockwise in the stream, 180°; and, Phase 3, was the maneuver to enter the slip and dock on the south side of Pier 90 (P. 33). The BRONX 4 had not yet been ordered off the camel operation and assigned to make fast to the bow of the RALEIGH until after the RALEIGH left the pier. The RALEIGH was in the stream and in Phase 2 when the BRONX 4 first arrived at the bow of the ship (Wilder P. 92). The bitts on the RALEIGH (also called Dutch bollards) are recessed in the hull (Steen P. 14). Captain Wilder described the maneuver of making a line fast vis-a-vis the ship and the tug (P. 61):

Q. Were there deck personnel stationed in the vicinity of the Dutchman's bollard that you referred to earlier?

A. No.

Q. Could you describe to us how the line would be passed from the tug and

get secured to the Dutchman's bollard?

A. The tug would have to pass the line, himself, either by putting a loop over the Dutchman's bollard or passing a line around the Dutchman's bollard and securing the bitt end on the tug's forecastle.

Q. Was it your understanding that the tug assisting the RALEIGH would pass a line to the Dutchman's bollard or someplace on deck?

A. He would pass his line to the Dutch bollard. He would not pass it up on deck.

Q. Was there any deck personnel stationed anywhere on the vessel, the RALEIGH, which had communication with the bridge, who could observe whether the tug had, in fact, passed a line to the RALEIGH?

A. The characteristics of the RALEIGH are such that you cannot see this bollard from any point on the RALEIGH.

That the BRONX 4 was encountering, while the ship was in the stream, between Phase 2 and Phase 3, the same problem with the bow overhang and flare as did the TRACY while the RALEIGH was made fast to the Pier, was admitted by Captain Wilder at Pages 79 and 80. He testified:

Q. Do you know whether the BRONX ever



got a line out to the Dutch bollard?

A. I don't know for a fact. All I can say is that, to the best of my recollection, she didn't in Phase 2, but when she came back in Phase 3, I got the report that she was made up and ready to go to work.

Q. Who gave you that report?

A. The Pilot.

Q. How did he get that?

A. I think it was through his oral exchange. He said there was a discussion between the Pilot and the Skipper of the BRONX 4, where Fitzgerald said, "Line up on that bollard and push," and he said, "I can't do it," and he said, "The hell you can't."

There was an argument over whether he could do it or not, and the outcome was, "O. K., I'll try it."

Q. The communication was that he could not get to that bollard?

A. That's right.

Q. The Pilot said, "The hell you can't; you can do it," and he said, "I'll try it"?

A. That's right.

Q. Precisely what stage was that?

- A. This was between Phase 2 and Phase 3,  
after he had broken away and started  
to leave, and the Pilot called him back.

Mervin Steen, Captain of the tug BRONX 4, described the BRONX 4 as 75 feet long, 25 feet wide, 1600 horsepower, twin screws and rudders, built in 1962 (Pp. 4 and 5). He had been working for Bronx Towing Line as a Pilot for 15 years and has a New York Harbor Pilot License (P. 6).

Steen came on watch before the BRONX 4 was ordered to put a line out to the forward most bow recessed bitt, while the RALEIGH was between Phase 2 and Phase 3 (P. 12).

He was unable to do so (P. 12), he then testified as to the reason at Page 12, 13:

Q. Why was that?

A. The overhang of the ship was too steep for me to get my tug under there and at the time the mate told me that there was no radio connection between the Pilot and us for some reason.

Q. No radio connection at all?

A. He said we were working on whistles, and I couldn't get the line on. I yelled up to him there, a loudspeaker I have on the tug, that I couldn't get the line on. I yelled up to him because of the overhang, and he said "You got to get a line on there" or something to that effect and I told



him I would try to get one back on the next one, it was the best I could do, and I dropped back and at the time I dropped back to get a line there he gave me a whistle signal for full ahead, which when I got the tug to the ship, alongside the ship, I acknowledged, and I gave him a whistle with full ahead.

Q. Was this before you had a line on?

A. This was before I had a line on. Meantime I am still trying to get my line on.

and at Page 15, 16 and 17:

Q. What happened next as you remember it after you got this full ahead order and got the line secured?

A. Then I got another full ahead.

Q. Why did you get a second full ahead?

A. I don't know. Evidently they didn't realize that the tug was going full ahead or something, which I can't see, and I acknowledged that I was going full ahead.

Q. In other words, they never gave you any other signal asking you to stop or back or anything?

A. No.

Q. How long do you think it was between these two full ahead signals?

A. Ten, fifteen seconds maybe.

Q. Incidentally, what did the full ahead signal consist of?

A. One whistle, the tug is supposed to be stopped alongside the ship, if you are stopped you get a one whistle, which I received, and a series of short blasts on the whistle, meaning full ahead.

The second time I got just a series of short blasts, which I took it for full ahead, which evidently they didn't realize I was doing.

Q. How long did you remain secured alongside the RALEIGH?

A. Up until the time that she connected with the FRANCE.

Q. Were you still secured when she touched the FRANCE?

A. Not quite.

Q. Did you keep your engine on full ahead all that time?

A. My engine was full ahead all the time.

The FRANCE was secured bow in, on the north side of Pier 88 (P. 17).

The BRONX 4, remained under full ahead (P. 17).



Captain Steen described the extreme difficulty in getting a line secured to the RALEIGH, while the latter was underway, at Pages 21 and 22:

Q. Did you have any difficulty getting in under the overhang of the RALEIGH'S bow?

A. Yes, that is where she was out in the stream, going the way she was it was very difficult to get underneath.

Q. What was the difficulty?

A. The difficulty was the overhang and then the structure of the vessel - it would have taken my pilothouse off.

Q. You mean your pilothouse could not fit under the bow?

A. No. If I could have laid head on --

Q. Where was the tug with relation to the RALEIGH'S bow when you were trying to get this line up on the bow?

A. She was out in the stream.

Q. Were you alongside the RALEIGH?

A. Yes, I was alongside the RALEIGH.

Q. Were you under the overhang then?

A. No, I was off her. You don't get underneath the overhang, you can't get underneath the overhang.

Q. I was not quite sure - were you trying to secure to the forward

bitt?

- A. I was trying to secure a line on the forward bitt which would give him the best possible pushing power on the bow. That is what I was trying to do and that is what he wanted me to do in the first place, which I couldn't do, the suction of the ship was pulling me in.

and at Pages 22 and 23:

Q. Did you speak to the Pilot yourself at all?

A. I spoke to him when I told him I couldn't get the line on the forward bitt and he said "You got to get a line some place" or something to that effect, and I told him "I will get it on the next one, I will try to get it on the next one."

Q. Did you have any trouble hearing the Pilot?

A. No, I could hear him when he yelled.

and further at Pages 23 and 24:

Q. How high above the water was this forward bitt you were trying to secure to the RALEIGH?



A. She was just a little higher than the bow.

Q. Then the deckhand could reach it?

A. He could reach it if he is standing on the bow, but it is a question of getting near it enough for him to - not to knock a man overboard - you have to get right up on those bitts, and to get up on them when a ship is going is difficult, it isn't as when a ship is standing still you have time, you don't have to worry about a man getting hurt, but when a ship is under way there is difficulty getting a line up there, a man can't throw it, he had to put it on.

The speed of the RALEIGH and the suction created thereby was described by Captain Steen at Pages 28, 29 and 30:

Q. Well, how do you know you couldn't get your bow up against the bow of the RALEIGH?

A. Because of the speed of the ship. This is no question of getting the bow - I could probably have gotten the bow, but with the speed of the ship I couldn't. I could have taken my radar off of the top of the house because that would have hit alongside because the side width isn't

as great as the bow width, the side width is only about three or four feet.

Q. That would be the outermost side of, let us say the port side of the outermost part of you hull?

A. To the wheelhouse I'm talking about, not the bow.

I couldn't get underneath there running sideways and at the speed the ship was going at the time I couldn't get a 90-degree angle onto him. If I could have I would be all right.

Q. And what was the speed of the ship, the RALEIGH, at that time?

A. I don't know her exact speed. She was going fast enough to pull me into her.

Q. Can you give us an estimate?

A. She was going three, four, five knots, she had enough way on her to pull us in with her suction.

Q. Well, did you at any time from the time you came up on the bridge until the time of this incident, did you actually feel such a suction?

A. Yes.

Q. When was that?

A. When I tried to get alongside of her.



Q. And approximately how long was that prior to the incident?

A. Say six, seven minutes.

Q. And those six or seven minutes, when is that in relation to the time you received the order for full ahead?

A. Right after I got alongside of her when I got up to the bitt where I could get a line onto her.

Q. And you received this order for full ahead, and up until the time of the incident you received no other orders?

A. No sir.

Q. So for at least six or seven minutes you were going full ahead on your tug?

A. Yes, but not at a 90-degree angle.

Q. At what angle?

A. About fifteen degrees.

When collision was imminent the BRONX 4 was forced to cast off her line to the RALEIGH and back away, otherwise she would have been crushed and sunk. At Pages 18, 19, 20 Steen stated:

Q. I gather you ultimately cast off your line from the RALEIGH?

A. Yes.

Q. How far was your tug from the FRANCE when you cast the line off?

A. We was touching.

- Q. You were touching the FRANCE?
- A. My tires on the starboard side were touching the FRANCE when I let go.
- Q. Which tires were they, the bow tires or-
- A. Waist tires.
- Q. And where was your port side at that time?
- A. My port side at that time was by the RALEIGH.
- Q. What part of the FRANCE were you touching with your waist fenders?
- A. I was touching the side - I didn't take notice that much, I was too busy doing something else.
- Q. I wonder if you could take that pad and draw an outline of the RALEIGH and an outline of the FRANCE and show where the tug was with relation to the two of them?

MR. RYAN: At the time the waist fenders were touching?

MR. WOOD: Yes.

#### THE EXPERTS

Expert testimony was received in open Court by a witness called by each Defendant. The Government called Captain Stillwaggon, an inter-port pilot. The objectiveness of his testimony can best be described as an attempt to honor his maritime sponsor



and teacher. On cross examination he was asked the following questions and gave the following answers (Stillwaggon T.M. 15):

CROSS EXAMINATION BY MR. DUGGAN:

Q. Mr. Stillwaggon, did you know the Pilot who was on board the vessel?

A. Yes, I knew him very well.

Q. Could you tell us what your relationship with him was?

A. Well, Ed Fitzgerald is the man who broke me in as docking Pilot some years ago. That was at a time when it was difficult to get someone to sponsor you into this business and Ed Fitzgerald took me aboard many, many ships and I learned from him how to handle ships.

MR. DUGGAN: No further questions.

and again at Page 35 and 36:

CROSS EXAMINATION BY MR. RYAN:

Q. Captain, in response to a question by Mr. Duggan, you said that you were taught by Captain Fitzgerald who was the Pilot of this Navy vessel, is that correct?

A. That is right.

Q. Now, you were an apprentice under him

were you not?

A. That is right.

Q. And he brought you aboard and broke you in and taught you, is that so?

A. That is right.

Q. And besides that, I think you told us that it was very difficult to get a sponsor and he sponsored you at a time when it was hard to get in the union, or whatever it is?

A. That is right.

Q. You know that Captain Fitzgerald is dead, is that so?

A. Yes.

Q. Did you attend his funeral?

A. Yes, I did. I went to the wake. I worked on the day of the funeral.

Q. In effect, Mr. Fitzgerald was your Godfather, isn't that so?

A. Yes, more than that. He was a very good friend of mine.

Defendant, Bronx Towing Line, Inc., called as its expert Captain Ralph Merrill, an employee of Moran Towing Company. He has been a tug boat captain for 41 years, has been engaged in docking ships for 15 years and holds an unlimited Pilot's license, any class, any tonnage (T. M. Pages 52 and 53). He is presently engaged in docking and undocking ships for Moran, frequently in the vicinity of Piers 88 and 90.

Captain Merrill testified in his opinion it was imprudent to



cast the lines off the RALEIGH and proceed into the stream without first having a tug made fast to the ship to be ready to assist when needed (T. M. P. 54). Merrill stated it was extremely important that a Pilot make certain that an assisting tug was in fact made fast to the ship and ready to do her job before proceeding into a slip (T.M. P. 56). Considering the size and tonnage of the RALEIGH, it was the custom followed by Moran Towing Company, and other tug boat operators in New York, to have one tug assisting for undocking into the stream and two assisting tugs for docking, "especially where there is another ship in the slip like that" (T.M. P. 56). Merrill stated it was "very difficult" to get a line fastened to a recessed bitt similar to those on the RALEIGH and in many cases he has stopped the ship in the stream until the lines were made fast (T.M. P. 57). In his opinion, with the ship's port engine two-thirds ahead, it would be very hard for the tug to get "head on" to the ship because that engine speed would have the RALEIGH moving very fast (T.M. P. 58). As to the propriety of the BRONX 4 backing out and away seconds before the collision, Captain Merrill testified that the tug Captain has a duty to his tug, his crew and himself to get free and clear after staying in position as long as possible. That is a known fact between Pilots and tug Captains (T.M. P. 59).

#### ARGUMENT

Having heard and seen the three expert witnesses and having the depositions extensively quoted by each party, the Trial Court had the total picture of what transpired. The Court found that the BRONX 4 did everything within its power to fulfill the orders of the Pilot, even agreeing to "try again" to get a line out to

the RALEIGH after telling the Pilot that it was impossible. The RALEIGH naively glosses over the obvious fact that had the Pilot taken the speed off his vessel and remained dead in the water, the BRONX 4 may have been able to get the line attached and then gotten head on (90°) to utilize her power. The RALEIGH had no compelling need to cast off her lines and head out to the middle of the river without tug power. The Navy supplied three tugs for the instant operation, the Pilot used none to undock. In the Selma City-Alice, U. S. D. C. Maryland, 1936, American Maritime Cases 933, (not otherwise reported), wherein a steamer, 424 feet long, 54 feet wide, was to be shifted from one slip to another with the assistance of tugs. Before the tug made her lines fast the steamer, the latter cast off all her dock lines and struck a moored vessel. The Trial Court exonerated the tug and held the steamer solely liable holding as a "matter of law" at Page 934:

"7. The fault lay in letting go all the lines before the ship was completely under the control of the tug"

In the S/S THOMAS M. 441 Fd. 724 (C.A. 4), the Court considered an appeal of a case somewhat similar to the case at bar. There the THOMAS M. was proceeding in the Potomac River, laden with a full cargo of oil for discharge at a pier. The tug LITTLE CURTIS was engaged to assist the tanker in docking. The tug did not provide a docking Master. The tanker was under the command of her Master and a Chesapeake Bay Pilot. Following the Pilot's order, the LITTLE CURTIS tied its bow to the tanker's port stern quarter so it could push head-on at 90° angle to keep the tanker's stern toward the pier. Although the tug was in



position, she was unable to push head-on and the tanker's bow struck the pier. The Appellate Court affirmed the findings of the District Court when it held that because of the tanker's unreasonable speed the tug could not get head-on and push. The tanker was held solely at fault. The Court also found that the tug LITTLE CURTIS was not at fault. The tanker was complaining that the tug Captain should have warned the Pilot of the excessive speed and of its inability to push head-on.

The Court stated at P. 725:

"Speculation that the accident could have been avoided had the tug's master given warning of the tanker's speed and of his inability to come head-on furnishes an inappropriate basis for holding the tug liable as matter of law. This case provides an apt occasion for application of the rule:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." City of New York, 147 U. S. 72, 85 (1893)."

In the SANTA ROSA (S.D.N.Y.) 150 F. Supp. 425, the Court

considered a fact situation concerning the docking of Grace Lines ship SANTA ROSA at Pier 58, North River, with the assistance of three tugs. During the docking operation the ship's propeller was struck by one of the assisting tugs. The Court stated at Page 429:

"The liability of an assisting tug to the vessel being assisted depends upon whether the tug has been guilty of negligence. The tug is not an insurer. Her obligation is to exercise reasonable skill and care. GRIFFIN on collision, 1949, P. 416-417. The mere happening of an accident to the vessel does not establish the tug's negligence, which must be proved affirmatively. GRIFFIN, supra, P. 417, 460".

The RALEIGH relies heavily on the testimony of Mate McGuirk. His first statement of his recollection were taken seven years after the subject collision, shortly before he testified.

The true picture of the grossly negligent acts and omissions of the Pilot can be gleaned from the testimony of the RALEIGH'S Master, Captain Wilder, when he testified that he was about to relieve the Pilot on the spot and take command himself when, after two warnings about the RALEIGH continuing under two-thirds speed ahead, the Pilot finally stopped his engines.

Appellant appears to rely heavily on the recent opinion of this Court. Fairmont Shipping Corp. vs. Chevron International Oil Co. \_\_\_\_\_ F. 2d \_\_\_\_\_, decided February 4th, 1975. The fact situation in the Chevron Case is totally



different than the situation in this case. In Chevron the ship had been underway; the assisting tugs had their lines made fast to the ship; the tugs unilaterally abandoned the ship fearing for their safety when in fact there was no actual pending damages. This Court found that the tugs actions did not measure up to that degree of skill and judgment possessed by the towing community in general.

In this case there was an abundance of "active hindrance" on the part of the RALEIGH. Her Pilot should have ordered the BRONX 4 from midstream to the RALEIGH'S starboard bow before the ship left the pier. The RALEIGH should have utilized two tugs in midstream. She should have stopped dead in the water with two tugs holding her in check until the line could be attached to the recessed bitt. The RALEIGH should have stopped her forward port engine when it appeared her bow was breasting toward the moored FRANCE. Having had actual notice from the BRONX 4 that the line could not be made fast, the RALEIGH should not have proceeded into the slip without making certain that the line had been successfully made fast.

#### CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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